Supreme Court, U.S.
FILED
JAN 31 1996
CLERK

No. 95-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND
AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP,
ET AL.,

Respondents.

On Petition For Writ Of Certiorari To
The Colorado Court Of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

LEIGHTON AIKEN
(Counsel of Record)
DANA M. CAMPBELL
OWENS, CLARY & AIKEN, L.L.P.
1717 Main Street
Suite 2400
Dallas, TX 75201
(214) 698-2100

JOHN C. TREDENNICK
ELIZABETH A. PHELAN
HOLLAND & HART
555 - 17th Street
Suite 3200
Denver, CO 80201-8749
(303) 295-8000

Attorneys for Respondents

31 pp

QUESTION PRESENTED

Whether the award of punitive damages, in an amount equal to the actual damages and based upon evidence proven beyond a reasonable doubt, violated the Due Process Clause where the circumstances of this case demonstrate that the award was reasonable and the procedures used in assessing and reviewing the award imposed sufficiently definite and meaningful constraints on the discretion of the jury.

PARTIES TO THE PROCEEDINGS

The petition accurately identifies the parties to the proceedings in the Colorado Court of Appeals, except that Cheyenne Associates Limited Partnership also was a defendant-appellee.

Pursuant to Supreme Court Rule 29.6, respondent East Hampden Associates Limited Partnership states that it is a Delaware limited partnership and that none of its partnership interests is publicly traded.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 12

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S RECENT DECISIONS CONSIDERING PUNITIVE DAMAGE AWARDS 13

1. This Court's Decisions in *Haslip* and *TXO* Do Not Require an Analysis of the Closeness of the Case. 17

2. Due Process Does Not Require That a Punitive Damage Award Be Judged by a Defendant's Net Worth 19

II. THE APPELLATE REVIEW AFFORDED LIFE CARE WAS CONSTITUTIONALLY ADEQUATE. 20

III. THE ISSUES IN *BMW* ARE NOT PRESENT HERE. 22

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

CASES

Benny M. Estes & Assoc. v. Time Ins. Co., 980 F.2d 1228 (8th Cir. 1992) 17

BMW of North America, Inc. v. Gore, 646 S.2d 619 (Ala. 1994), *cert. granted*, 115 S.Ct. 932 (1995) 22

CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995) 16, 19

Continental Trend Resources, Inc. v. Oxy U.S.A., Inc., 44 F.3d 1465 (10th Cir. 1995) 16

Dunn v. Hovic, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S.Ct. 1650 (1993) 11, 21, 22

Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 15, 16

Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979) 21

Honda Motor Co. Ltd. v. Oberg, 114 S.Ct. 2331 (1994) 13

Hopkins v. Dow-Corning Corp., 33 F.3d 1116 (9th Cir.), *cert. denied*, 115 S.Ct. 734 (1994) 16

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) 22

Latham Seed v. Nickerson Am. Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 3037 (1993) 19

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 21, 22

Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980) 21

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032 (1991) ..... passim

Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) 21

Price v. Highland Community Bank, 932 F.2d 601 (7th Cir. 1991) 17

Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2120 (1994) 16, 22

TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993) ..... passim

Vasbinder v. Scott, 976 F.2d 118 (2d Cir. 1992) 17

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 S.Ct. 220 (1909) 21

Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993) 17

STATUTES

Colo. Rev. Stat. § 13-21-102(1)(a) (1987 Repl. Vol. 6A) 14

Colo. Rev. Stat. § 13-25-127(2) (1987) Repl. Vol. 6A) 14

No. 95-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

East Hampden Associates Limited Partnership ("East Hampden") respectfully responds to the petition for writ of certiorari filed by Life Care Centers of America, Inc. ("Life Care") to review the judgment of the Colorado Court of Appeals in this case.

INTRODUCTION

The petition should be denied for three fundamental reasons. First, it is based on an erroneous assumption—that the Colorado Court of Appeals "did not conduct anything resembling a 'thorough,' 'careful' appellate review." Pet. at 20. To the contrary, the Colorado Court of Appeals carefully reviewed and

assessed the evidence supporting the punitive damage award. Pet. App. 13a-15a,[1] thereby complying in all respects with the constitutional safeguards required by *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991), and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993).

Second, meaningful constraints were imposed upon the jury in this case. Specifically, without objection from Life Care, the jury was instructed that any award of punitive damages (a) had to be supported by the "beyond a reasonable doubt" evidentiary standard, (b) could not exceed the amount of compensatory damages, and (c) could be assessed only to punish Life Care, not to reward East Hampden. These specific, meaningful constraints fully comport with this Court's prior decisions.

Third, Life Care has waived its contention that the Colorado courts did not analyze the objective factors of "closeness of the case" or the impact of the award on its net worth. Life Care did not seek to introduce evidence at trial (a) that it lacked "notice" that its conduct was unlawful or (b) of its net worth. Further, Life Care never requested the trial court to instruct the jury concerning these two "objective factors" in connection with East Hampden's claim for punitive damages.

STATEMENT OF THE CASE

Background. In 1987, East Hampden purchased the Cherry Creek Nursing Center ("CCNC"). At that time, CCNC was a nursing home offering skilled nursing care, assisted living, and specialized care for those suffering from the Alzheimer's disease. Pet. App. 1a.

---

[1] The appendix attached to the petition is cited as "Pet. App." The appendix attached to this brief in opposition is cited as "Opp. App." The brief that respondents filed in the Colorado Court of Appeals is cited as "Appellees' Br. at _____."

Through April 1991, Life Care managed CCNC for East Hampden and was responsible for the day-to-day operations. In April 1991, East Hampden terminated Life Care after learning that Life Care had misappropriated key business opportunities and fiscally mismanaged CCNC. *Id.* at 2a. As a result of Life Care's wrongful conduct, CCNC was in financial ruin, with two of its three profit centers, assisted living and Alzheimer's care, all but destroyed.

Life Care's Duties Under the Management Agreement. As manager of CCNC, Life Care acted as agent for East Hampden and owed it strict fiduciary duties. Forrest Preston, Life Care's CEO and sole shareholder, testified that Life Care owed East Hampden the duties of "loyalty," "trust," "honesty," "the duty to look after East Hampden's best interests," and "the duty to maximize East Hampden's profits." He expressly admitted that Life Care would breach its duties to East Hampden if it engaged in activities that diverted patients from CCNC. Roger Park, Life Care's president of operations, confirmed Preston's understanding of Life Care's role as agent. He testified that Life Care had a duty to operate CCNC profitably, efficiently, and in the best interests of East Hampden. According to Park, Life Care had an obligation not to engage in any activity that would have a negative impact on CCNC. Appellees' Br. at 2.

Andrew Blair, an attorney hired by Life Care, provided expert testimony regarding Life Care's duties as agent and fiduciary to East Hampden. He stated that an agent's highest duty was full and complete disclosure. He explained that this obligation required an agent to disclose fully all facts that could adversely affect the operations of its principal's assets. According to Blair, if an agent engaged in competition against its principal, it was required first to make full disclosure and obtain a written waiver of any conflict of interest. *Id.*

Another Life Care witness, David Vaughan, general partner of CCNC's prior owner, testified regarding his understanding of Life Care's duties as manager of CCNC. Vaughan stated unequivocally that he neither intended nor envisioned that

Life Care would compete with, or divert patients from, CCNC.[2] He also testified that there was no understanding or agreement that Life Care could compete with, or manage facilities that competed with, CCNC. When questioned on the point, he testified:

> Q. And had you known that they were engaged in activities which either diverted patients from the [CCNC] or pulled patients out of the [CCNC], as general partner you would have fired them, wouldn't you have, sir?
>
> A. [A]nd the answer to your question . . . I would fire them. . . .
>
> Q. The general partner of any partnership that owned the [CCNC] would have that right, correct?
>
> A. I presume so.

Id at 3.

Life Care's Scheme to Divert Assisted Living Patients to the Cherry Creek Retirement Village. In 1986, Preston acquired the land next to CCNC to develop a retirement center, to be called the Cherry Creek Retirement Village ("CCRV"). As originally planned, CCRV would cater to retired individuals seeking independent living arrangements, not persons needing assisted living services. For that reason, Life Care represented that CCRV would operate as a feeder to CCNC, not compete for patients. Life Care represented that it would manage the two facilities and operate both as a "campus." As residents aged, they would move from the independent living apartments at CCRV to CCNC, which

---

[2] Until 1989, when it opened CCRV and Garden Terrace, Life Care neither competed with CCNC nor managed or owned nursing facilities that competed with CCNC. *Id.*

offered higher levels of care in its assisted living and skilled nursing care units. *Id.* at 4.

By the spring of 1988, Preston and Life Care were having problems obtaining financing for the proposed retirement center. In part, this was due to the soft market for retirement facilities. At the time, lenders were expressing a general lack of confidence in retirement centers as a profitable business, and the Denver real estate market was in a recession. Potential lenders also balked at the size of the loan sought by Life Care. In fact, more than 20 different lenders had rejected Life Care's proposals during this two-year period. The viability of the proposed retirement center was so tenuous that its marketing director offered to resign. *Id.* at 4-5.

However, Preston and Life Care had invested more than $2.0 million to develop the retirement center. In an attempt to salvage this sizable investment, Karen Speir, CCRV's marketing director, and Bryan Preston, Preston's son, recommended to Larry Richardson, vice president of Life Care's retirement division, that Life Care consider alternative uses for the site. One alternative use, recommended by Richardson, was that Life Care add an assisted living unit. *Id.* at 5.

To keep their project alive, in 1988, Preston and Life Care decided to follow Richardson's recommendation and add an assisted living unit at CCRV. At this time, Life Care knew that assisted living was profitable to CCNC. For years, Life Care had marketed CCNC's assisted living unit as one of the "finest wellness programs" in the region. *Id.* Life Care also knew its decision to offer assisted living at CCRV would have a negative impact on CCNC. Preston admitted privately that the "financial impact on [CCNC] could be considerable" because CCRV's assisted living unit would attract residents from CCNC. Pet. App. 14a. As Preston and Life Care knew, many people seeking assisted living services find a retirement center, like CCRV, more attractive than a nursing home, like CCNC. *Id.* Moreover, Larry Richardson warned Ned Wilford, president of Life Care, that CCRV would attract patients from CCNC. Life Care not only failed to give a

similar warning to East Hampden, but Preston falsely represented that CCRV would have a positive impact on CCNC. Appellees' Br. at 6.

Life Care concluded, however, that an assisted living program like CCNC's would have "enormous appeal" and would be financially beneficial to CCRV. Among other things, it would afford Life Care the opportunity to charge higher rates, meet competition from other retirement centers, and keep residents at CCRV for a longer period of time. Higher revenues would also translate to greater profits for Forrest Preston. Almost immediately, Life Care began touting the potential success of an assisted living program, like the one at CCNC, to induce lenders to finance CCRV. *Id.*

Life Care Secretly Targets CCNC Patients. Before opening CCRV, Life Care did not disclose to East Hampden its plan to add an assisted living unit. Despite the obvious impact this new competition would have, Life Care did not reveal its intentions in its 1988 or 1989 management reports for CCNC. Even Raymond Tyler, Life Care's regional vice-president who oversaw CCNC's operations, was not told of Life Care's plans until just three months before the opening of CCRV. *Id.*

Once Life Care made the decision to add assisted living to CCRV, it secretly began targeting CCNC's assisted living patients. CCRV's executive director, Arletta Bourne, visited CCNC in an effort to identify possible candidates for a transfer to the CCRV. *Id.* Life Care's marketing director, Karen Speir, made a similar visit to CCNC and reported: "I found at least 35 very good prospects for our retirement community on the second floor of the [CCNC] nursing home." Pet. App. 13a.

CCRV opened in September 1989. Almost immediately thereafter, CCNC began losing patients, as Preston expected. Life Care went so far as coordinating the likely influx of patients from CCNC to CCRV. Appellees' Br. at 7.

Life Care's Scheme to Conceal Its Wrongful Competition and to Move Additional Patients to CCRV. Life Care was not satisfied merely to compete for assisted living patients against CCNC. Instead, it devised a scheme to persuade East Hampden to convert its profitable assisted living unit to skilled nursing beds. Pet. App. 14a. This would accomplish two objectives: it would eliminate Life Care's inherent conflict of interest and it would bring any remaining assisted living patients from CCNC to CCRV.

In October of 1989, a month after CCRV opened, Life Care wrote to East Hampden to propose a $400,000 conversion of CCNC's 60-unit assisted living unit into a luxury skilled care nursing unit. Preston claimed that it was always intended that the assisted living patients would be moved to CCRV upon its opening. He also represented that the move would be more profitable for the partnership. Appellees' Br. at 7. These representations were untrue.

First, numerous Life Care witnesses contradicted Preston and testified that it was never intended that assisted living patients would move from CCNC to CCRV. Larry Richardson, Life Care's senior vice president, testified that Preston's claim was "a preposterous notion." Other Life Care witnesses testified that the inclusion of assisted living at CCRV was a complete departure from the original plan for CCRV because the CCRV was always intended to be complementary to, rather than competitive with, CCNC. *Id.* at 7-8. Indeed, Life Care's witnesses confirmed that, before mid-1988, there were no plans to offer assisted living at CCRV and all marketing efforts at CCRV were aimed solely at independent living residents because CCRV was only to be "an independent living facility." *Id.* at 8.

Second, Preston's claim that adding 60 luxury skilled nursing beds would be profitable for CCNC was also untrue. By mid-1988, Preston knew that competition for skilled nursing patients in the CCNC's market was increasing dramatically, making CCNC's traditional, skilled-nursing services less profitable. Moreover, Preston acknowledged at trial that, at the

time of Life Care's proposal to convert, the market for skilled nursing beds was so saturated that Life Care had no plans to open any skilled nursing homes in Southeast Denver. Indeed, Park (Life Care's president of operations) admitted that the plan to convert the assisted living unit at CCNC to skilled nursing beds was, from an operational standpoint, "nonsensical." *Id.*

The true reason behind Life Care's proposed conversion of the assisted living unit at CCNC was, as Tyler admitted, to help Life Care "in recruiting patients from the [CCNC] to the [CCRV]." Similarly, as Preston conceded at trial, the plan to convert was proposed "to help fill rooms at the [CCRV] [for] which [Preston and Life Care had] personally guaranteed $16.0 million of debt." *Id.*

In May 1990, Life Care was desperate to receive East Hampden's consent to eliminate CCNC's profitable assisted living unit, thereby precluding any claim of conflict of interest against Life Care. To that end, David Gooch, Preston's son-in-law, instructed Raymond Tyler (the Life Care officer who oversaw CCNC's operations for Life Care) to draft a list of reasons, which could be forwarded to East Hampden, "justifying" the conversion. Tyler balked, advising Gooch that he thought the proposal was not in CCNC's best interests. Gooch told Tyler to document the "reasons" anyway. Tyler complied and Life Care presented the written recommendations to East Hampden in a May 1990 letter. *Id.* at 8-9.

Life Care never told East Hampden that Tyler, the author of the recommendations contained in the May 1990 letter, was opposed to the conversion plan. Life Care also concealed the fact that certain significant representations contained in the May 1990 letter were untrue, as Tyler admitted at trial. Finally, Life Care never advised East Hampden that the proposal to convert the assisted living unit of CCNC was not in the best interests of CCNC, but instead was solely to benefit CCRV.

CCRV competed actively against CCNC for assisted living patients. In part because of its targeting of CCNC's resi-

dents, Life Care quickly filled the 24 units initially devoted to assisted living at CCRV. Demand was so great that Life Care added an additional 10-bed unit to CCRV, which completely filled by early 1990. At this time, CCNC could not fill its assisted living beds. In the fall of 1991, CCNC was forced to close its assisted living program because it could not compete with CCRV's program. *Id.*

Life Care's Scheme to Compete with CCNC for Alzheimer's Patients. Shortly after Life Care opened CCRV and began competing for assisted living patients, it opened Garden Terrace and began competing for Alzheimer's patients. *Id.* In so doing, Life Care again breached its duties by misappropriating valuable information, competing against CCNC, and taking its patients, all without notice to or consent from East Hampden.

By 1988, Life Care's internal studies revealed that the incidence of the Alzheimer's disease was increasing dramatically and that large numbers of people suffering from the Alzheimer's disease would need institutional care. The study also suggested that Southeast Denver would need additional capacity to care for such patients. Because it managed CCNC, Life Care knew that CCNC's Alzheimer's unit was extremely profitable and that CCNC was receiving as many as seven calls a day requesting Alzheimer's care. *Id.* at 10.[3]

Life Care never shared its internal studies with East Hampden. Rather than recommend expansion of CCNC's Alzheimer's services, Life Care used the information for its own financial benefit to develop and open Garden Terrace, located just three miles from CCNC. *Id.*

---

[3] By February 1989, CCNC had two Alzheimer's units. It added the second unit because demand for Alzheimer's care was high. The additional patients were also expected to yield $250,000 in profits. *Id.*

Garden Terrace opened in the fall of 1989 and hired CCNC's marketing director. Except for Preston, virtually every other witness acknowledged that Garden Terrace competed with CCNC for Alzheimer's patients. As competitors, both facilities sought to attract the same patients and offered similar services. Pet. App. 14a.

Almost immediately after Garden Terrace opened, CCNC's Alzheimer's population began to decline. By the summer of 1990, just months after Garden Terrace opened, CCNC was forced to close one of its two units. More than ten former residents of CCNC had moved to Garden Terrace, which represented approximately fifty percent of the Alzheimer's patients at CCNC. *Id.*

The Legal Proceedings. The trial lasted eleven days. Faced with a claim for millions of dollars in actual damages and a commensurate amount in punitive damages, Life Care chose not to introduce evidence at trial that it lacked notice that its conduct was unlawful. Life Care also did not introduce evidence of its net worth for the jury's consideration in connection with the claim for punitive damages. Life Care never requested that the jury be instructed regarding "closeness of the case" or the relationship between a punitive damage award and its net worth. Rather, Life Care expressly approved the trial court's jury instruction concerning punitive damages. The jury instruction read:

> If you find in favor of East Hampden and award it actual damages on its claim of breach of fiduciary duty, then you shall consider whether exemplary damages should be assessed against Life Care.... *If you find beyond a reasonable doubt* that the injury complained of was attended by circumstances of malice or willful and wanton conduct, then in addition to actual damages, you may also assess a reasonable sum *as exemplary damages not to exceed the amount awarded as actual damages.*

> *Exemplary damages*, if assessed, *are to be assessed as punishment of Life Care* . . . and as an example to others.

Opp. App. 1a (emphasis supplied). In fact, Life Care submitted and received a virtually identical punitive damage instruction for its tortious interference claim against respondents.

The jury found that Life Care had breached its fiduciary duties as an agent of East Hampden and awarded $6 million in compensatory damages to East Hampden. Pet. App. 1a. Consistent with Colorado law, the jury also awarded $6 million in punitive damages. *Id.*

The trial court denied Life Care's motion for a new trial or a judgment n.o.v. *Id.* at 19a.[4] In that post-trial motion, Life Care again failed to offer evidence of its net worth.[5]

On appeal, Life Care was granted every opportunity to present its case before the Colorado Court of Appeals. Life Care requested and received permission to file a brief in excess of the length allowed under the Colorado Appellate Rules and convinced the Colorado Court of Appeals to double the time customarily

---

[4] The trial court's review of the judgment was plainly adequate. In *TXO*, this Court held that although doing so is "always helpful," a trial court need not explain the basis for its ruling concerning a punitive damage award. 113 S.Ct. at 2724. *See Dunn v. Hovic*, 1 F.3d 1371, 1381 (3d Cir.) (relying on *TXO*, the Third Circuit rejected defendant's challenge to the punitive damage award based upon the trial court's failure to review the jury award *de novo*) , *cert. denied*, 114 S.Ct. 1650 (1993).

[5] Life Care offered evidence of its net worth for the first and only time in connection with a motion for stay of execution without security pending the filing and consideration of post-trial motions.

allowed for oral argument. With respect to the punitive damage award, Life Care asserted that the award should be reversed because (a) it was not supported by sufficient evidence, and (b) the award violated both Colorado law and the Due Process Clause.

In rejecting Life Care's challenge, the Colorado Court of Appeals relied on evidence regarding (a) Life Care's improper recruitment of patients from CCNC, (b) Life Care's knowing deceit of East Hampden in proposing a business plan to which its regional vice president was opposed, (c) Life Care's concealment of the financial impact on East Hampden of its competitive activities, and (d) Life Care's hiring of CCNC's marketing director for Garden Terrace and knowing competition with, and attraction of patients from, CCNC to Garden Terrace. Pet. at 13a-15a. Based on this extensive assessment of the evidence, the Colorado Court of Appeals held that "there was ample evidence to support the jury's award of exemplary damages." *Id.* at 13a.

The Colorado Court of Appeals denied Life Care's petition for rehearing. Similarly, the Colorado Supreme Court denied Life Care's request for *certiorari* review. *Id.* 17a.

REASONS FOR DENYING THE PETITION

Both the trial and the appellate court, on three separate occasions, have rejected Life Care's contention that the punitive damage award is unconstitutional. Specifically, the Colorado Court of Appeals reviewed the evidence in the record, which showed that with full knowledge of the devastating consequences to CCNC, Life Care systematically destroyed two of CCNC's most important profit centers for the sole purpose of benefiting Life Care and its affiliates. Pet. App. 13a-15a. The record also reflected that, in order to conceal its actions and attempt to obtain consent to its wrongful competition, Life Care engaged in a massive cover-up, based upon lies and deceptions, when CCNC began to experience the harms from Life Care's actions. *Id.* After considering this evidence, the Colorado Court of Appeals "conclude[d] that this evidence is sufficient to support an award of

exemplary damages. . . ." *Id.* This ruling was specific and fact-intensive and, therefore, met all the requirements of *Haslip* and *TXO.*

Moreover, the punitive damages award was based upon proper jury instructions that went beyond constitutional safeguards imposed by this Court. The jury was instructed that (a) Life Care's willful and wanton conduct had to be proved beyond a reasonable doubt, (b) the award could not exceed the amount of compensatory damages, and (c) the award was to punish Life Care, not reward East Hampden.

Finally, Life Care's principal ground for requesting review—that the Colorado Court of Appeals "failed to consider the objective factors of closeness of the case and petitioner's net worth," Pet. at 9—has been waived. Life Care never presented evidence at trial or requested that the jury be instructed regarding these "objective factors."

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S RECENT DECISIONS CONSIDERING PUNITIVE DAMAGE AWARDS

The review afforded Life Care by the Colorado Court of Appeals is consistent with this Court's decisions in *Haslip* and *TXO.*[6] Contrary to Life Care's suggestion, this Court has never required an analysis of "the closeness of the case" or the impact of

---

[6] This Court's decision in *Honda Motor Co. Ltd. v. Oberg*, 114 S.Ct. 2331 (1994), is not relevant to this case. In *Honda*, this Court determined that Oregon law, which provided no procedure for reducing or setting aside an exemplary damage award except in narrow circumstances, violated due process. Life Care has not argued and cannot argue that Colorado law prohibits its appellate courts from reviewing exemplary damage awards. In fact, Life Care requested and received such review in this case. Pet. App. 13a-15a.

the award on the defendant's net worth. Rather, this Court has repeatedly upheld awards of punitive damages if the circumstances of the case indicate that the award is reasonable and the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the jury.

In *Haslip*, this Court declined to adopt an objective test for upholding a punitive damage award under the due process clause, notwithstanding the unlimited discretion that the *Haslip* jury had in awarding punitive damages.[7] Specifically, this Court ruled:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

111 S.Ct. at 1043. The Court upheld a punitive damage award that was four times greater than the compensatory damage award.

In *TXO*, this Court again rejected the petitioner's request for an application of "certain 'objective criteria' to determine

---

[7] Unlike the jury in *Haslip*, the jury in this case was restrained in two principal respects. First, the jury's exemplary damage award was limited, by statute, to the amount of the compensatory damage award. Colo. Rev. Stat. § 13-21-102(1)(a) (1987 Repl. Vol. 6A). Second, the evidentiary burden on East Hampden for establishing entitlement to punitive damages was a "beyond a reasonable doubt" standard, *id.* § 13-25-127(2), rather than the lenient standard of "preponderance of the evidence" approved in *Haslip*.

whether the punitive damage award violates . . . due process of law." 113 S.Ct. at 2719. In rejecting reliance on the "objective criteria" approach urged by TXO, this Court stated that "we question, however, the utility of such a comparative approach as a test for assessing whether a particular punitive damage award is presumptively unconstitutional." 113 S.Ct. at 2720. Instead, noting the safeguards in the judicial process, this Court held that a judgment that is a product of a fair judicial process is entitled to a strong presumption of validity. *Id.* at 2719-20.[8] The Court upheld a punitive damage award that was 526 times greater than the actual damage award.

Following *Haslip* and *TXO*, lower courts have similarly affirmed punitive damage awards if the circumstances of the case confirm the reasonableness of the award. In *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991), the Fifth Circuit held that the constitutional requirement that an award of punitive damages be reasonable under the circumstances of the case

---

[8] Specifically, the Court explained:

> The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity.

TXO, 113 S.Ct. at 2719-20.

> [i]s not a vehicle for extensive appellate review. . . . It creates, instead, a narrow channel for appellate review in which the focus of a reviewing court is to ensure that, *under the circumstances of the case in question*, the award of punitive damages is not grossly excessive or unreasonable.

Id. (footnote omitted) (emphasis in original). The Fifth Circuit further noted that the fact-finder is in the best position to determine the amount of the punitive damage award, ruling:

> In reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award. If there are *any* circumstances of probative force that support the amount of the award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*.

Id. (emphasis in original).[9]

---

[9] Other circuit courts have drawn a similar conclusion. *See, e.g., Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 44 F.3d 1465 (10th Cir. 1995) (Tenth Circuit affirmed an award of $269,000 in compensatory damages, and $30 million in punitive damages); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995) (First Circuit upheld a punitive damage award that was 55% of the defendant's net worth, noting that the award was reasonable in light of the circumstances of the case); *Hopkins v. Dow-Corning Corp.*, 33 F.3d 1116 (9th Cir.), *cert. denied*, 115 S.Ct. 734 (1994) (this Court declined review of a Ninth Circuit opinion upholding an award of $840,000 in compensatory damages and $6.5 million in punitive damages); *Robertson Oil Co. v. Phillips Petroleum*

(...continued)

The decision of the Colorado Court of Appeals is fully consistent with these decisions. The jury was presented with overwhelming evidence of Life Care's willful and wanton conduct, including its attempt to conceal its wrongdoing from East Hampden through nefarious means. *See supra* at 7-9. The trial court properly instructed the jury, without objection from Life Care, concerning the law relating to punitive damages, and the jury rendered its verdict applying the law to the facts in the case. The punitive damage award was reviewed and upheld by the judge who conducted the trial and heard all of the evidence, was affirmed by a unanimous decision of the Court of Appeals, and found not to warrant review by the Colorado Supreme Court. To require a more thorough review would be tantamount to requiring a trial *de novo* at the appellate level.

1. This Court's Decisions in *Haslip* and *TXO* Do Not Require an Analysis of the Closeness of the Case.

Life Care insists that an assessment of the evidence was required to determine the "closeness of the case"—or, in other words, whether Life Care had notice that its conduct was unlawful, even though it never raised this issue at trial. First, both

---

(...continued)

Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2120 (1994) (this Court declined review of an Eighth Circuit opinion affirming a punitive damage award that was more than four times greater than the compensatory damage award); *Benny M. Estes & Assoc. v. Time Ins.. Co.*, 980 F.2d 1228 (8th Cir. 1992); *Winant v. Bostic*, 5 F.3d 767 (4th Cir. 1993); *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (Second Circuit, in reversing a punitive damage award that exceeded 50% of a defendant's net worth, held that "[a]n award of punitive damages should be reversed only if it is 'so high as to shock the judicial conscience and constitutes a denial of justice.'"); *Price v. Highland Community Bank*, 932 F.2d 601 (7th Cir. 1991).

Haslip and *TXO* squarely declined to adopt such an "objective" criterion. *See supra* at 13-15.

Second, the Colorado Court of Appeals did assess the evidence and concluded that Life Care's conduct was knowingly unlawful. The Colorado Court of Appeals specifically found that there was sufficient evidence establishing, among other things, that Life Care actively recruited patients from CCNC to its facility, knew that its diversion of patients would have a negative financial impact on CCNC, knew that its own regional vice-president opposed the scheme to cover up its diversion of patients through the proposed conversion of CCNC's profitable assisted living unit, and deliberately attracted Alzheimer's patients from CCNC to its own facility. Pet. App. 13a-14a.

Moreover, Life Care's assertion that "there is not even a hint that the conduct in question was 'tortious,'" Pet. at 13, completely ignores the evidence. *See supra* at 2-10. Life Care's chairman and president each admitted that any conduct of Life Care that diverted patients from CCNC was a breach of Life Care's duties to East Hampden. *Id.* at 3.

Furthermore, no jurisdiction has or would condone Life Care's conduct in this case. Life Care cannot cite a single decision that legalizes:

- its scheme to divert patients from CCNC to its own facility;
- its attempt to steal patients from CCNC;
- its plan to conceal its wrongful competition through a business plan that its own regional vice president opposed and advised would harm CCNC; or

- its unlawful competition for Alzheimer's patients by concealing important marketing information and hiring CCNC's marketing director.

An agent that goes to such great lengths to harm its principal's business and then conceal its wrongful conduct has engaged in tortious conduct under the laws of any jurisdiction in this country.

2. Due Process Does Not Require That a Punitive Damage Award Be Judged by a Defendant's Net Worth.

Life Care claims that the failure to compare the relationship between the punitive damage award and its net worth violates due process, [10] yet has not cited a single case holding that the due process clause requires such an inquiry. To the contrary, in *Haslip*, this Court upheld a punitive damage award, even though no evidence of the defendant's net worth was introduced in accordance with Alabama law. *Haslip*, 111 S.Ct. at 1044.

Other courts have ruled that "there is no general rule defining the maximum proportion of net worth that may be exacted." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 706 (1st Cir. 1995) (upholding a punitive damage award which was approximately 55% of the defendant's net worth). *See Latham Seed v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1499 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 3037 (1993) (Eighth Circuit held that none of the states whose law was at issue required the plaintiff to prove a defendant's net worth before recovering punitive damages).

---

[10] In fact, the Colorado Court of Appeals *did* consider Life Care's net worth and correctly concluded that the award "does not violate the Due Process Clause. . . ." Pet. App. 15a.

In any event, Life Care has waived its right to argue that its net worth warrants a finding that the punitive damage award violates due process. Life Care did not offer evidence of its net worth at trial for the jury to consider in conjunction with East Hampden's request for punitive damages. Life Care did not offer or cite any evidence of its net worth in its Brief in Support of Motion for Judgment N.O.V., filed Dec. 17, 1992.[11] Instead, Life Care presented evidence of its purported net worth only in conjunction with a post-trial motion seeking a stay of execution without need for a surety bond pending the filing and consideration of substantive post-trial motions.

II. THE APPELLATE REVIEW AFFORDED LIFE CARE WAS CONSTITUTIONALLY ADEQUATE.

Life Care claims that the Colorado Court of Appeals' "implicit" application of the passion-and-prejudice standard conflicts with the decisions of other courts. Pet. at 18. This claim should be rejected because (a) the courts below did not apply a passion-and-prejudice standard and (b) the review conducted by the Colorado Court of Appeals is not in conflict with that given by any other court.

First, Life Care erroneously assumes that the Colorado Court of Appeals applied a passion-and-prejudice standard in reviewing the punitive damage award. To the contrary, the Colorado Court of Appeals applied the standard espoused by the Colorado Supreme Court, which standard was approved in *Haslip*, 499 U.S. at 22.

---

[11] Rather, in that brief, Life Care argued, without evidentiary support, that the *actual* damages award ($6 million) represented "one-fifth of Life Care's total net worth," that payment of that award would have "a substantial and unforgettable impact" on Life Care, and that an additional award of punitive damages was unnecessary. *Id.* at 92.

Under Colorado law, exemplary damages are justified where the defendant engages in "conduct that creates a substantial risk of harm to another and is purposely performed with an awareness of the risk and disregard of the circumstances." *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215 (Colo. 1984). The trial court in the first instance, and later (if challenged) an appellate court, must decide whether the evidence suffices to warrant submitting the issue to the jury. *E.g., Mince v. Butters*, 200 Colo. 501, 616 P.2d 127, 129 (1980). As the Colorado Court of Appeals found, "[t]he standard to be applied [on appeal] is whether there was sufficient evidence, when viewed in its totality and in a light most supportive of the verdict, to support the jury's finding on this issue." *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852, 854 (1979). *See* Pet. App. 13a. Applying this proper legal standard to the facts in the record, the Colorado Court of Appeals properly upheld the jury's award of punitive damages.[12]

Second, assuming that the Colorado Court of Appeals' decision fell under the rubric of a "passion-and-prejudice" review, Life Care's reliance upon the pre-*TXO* decision in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), is misplaced. In *Mattison*, the Fourth Circuit inferred from the discussion in footnote 10 in *Haslip* that "the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by court review . . . ," and held that such an inference was equally applicable to the South Carolina procedure. 947 F.2d at 98. However, no such broad discretion was given to the jury in this case. In an instruction approved by Life Care, the trial court admonished the jury that any award of punitive damages must be

---

[12] Life Care's argument that review is warranted because of the "size of the exemplary damage award," Pet. at 8-9, is erroneous. As a matter of law, the size of a punitive damage award alone is not enough to constitute a violation of due process. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220 (1909); *Dunn v. Hovic*, 1 F.3d 1371, 1383, *cert. denied*, 114 S.Ct. 1650 (1993).

supported by the beyond-a-reasonable-doubt evidentiary standard *and* must not exceed the amount of compensatory damages. *See supra* at 10-11. These constraints, coupled with the Colorado Court of Appeals' detailed review of the evidence supporting the award, establish that *Mattison* has no application here. Pet. App. at 13a-15a.[13]

III. THE ISSUES IN *BMW* ARE NOT PRESENT HERE.

Life Care argues that this case should be held pending a decision by this Court in *BMW of North America, Inc. v. Gore*, 646 S.2d 619 (Ala. 1994), *cert. granted*, 115 S.Ct. 932 (1995). Pet. at 22. The issues raised in *BMW* are not present here.

In *BMW*, the Alabama Supreme Court remitted the amount of the punitive damage award without offering any explanation for the remittitur. 646 S.2d at 629. Here, by contrast, the Colorado Court of Appeals did not merely affirm, without opinion or analysis, the punitive damage award. Rather, the Colorado Court of Appeals identified compelling evidence of Life Care's willful and wanton conduct, applied the legal requirements that the amount be reasonable and not exceed the actual damage award, and held that the punitive damage award did not violate due process. Pet. App. 13a-15a. Thus, *BMW* has no bearing on this case, and this case should not be stayed pending a decision in *BMW*.

---

[13] Life Care's reliance on *Mattison* is misguided for another reason. At least two circuits have completely disregarded *Mattison* because it was decided before *TXO*. *See Robertson Oil*, 14 F.3d at 379 n.8; *Dunn*, 1 F.3d at 1381. Additionally, after *TXO*, several judges of the Fourth Circuit have criticized *Mattison*. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1419-49 (4th Cir. 1992).

CONCLUSION

The petition should be denied.

Respectfully submitted,

LEIGHTON AIKEN
(Counsel of Record)
DANA M. CAMPBELL
OWENS, CLARY & AIKEN, L.L.P.
1717 Main Street
Suite 2400
Dallas, TX 75201
(214) 698-2100

JOHN C. TREDENNICK
ELIZABETH A. PHELAN
HOLLAND & HART
555 - 17th Street
Suite 3200
Denver, CO 80201-8749
(303) 295-8000

Attorneys for Respondents

APPENDIX

INSTRUCTION 65

If you find in favor of East Hampden and award it actual damages on its claim of breach of fiduciary duty, then you shall consider whether exemplary damages should be assessed against Life Care and American Lifestyles. If you find beyond a reasonable doubt that the injury complained of was attended by circumstances of malice or willful and wanton conduct, then in addition to actual damages, you may also assess a reasonable sum as exemplary damages not to exceed the amount awarded as actual damages.

Exemplary damages, if assessed, are to be assessed as punishment of Life Care and American Lifestyles and as an example to others.